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No. 80-1183

In the Supreme Court of the United States

OCTOBER TERM, 1981

JAMES EDGAR,
APPELLANT,

v.

MITE CORPORATION AND MITE HOLDINGS, INC.,
APPELLEES.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR APPELLANT

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No. 80-1188

In the Supreme Court of the United States

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REPLY BRIEF FOR APPELLANT

ARGUMENT

I.

THE INSTANT APPEAL IS NOT MOOT BECAUSE IF THIS COURT REVERSES THE JUDGMENT BELOW AND THE PERMANENT INJUNCTION ENTERED AGAINST THE ILLINOIS SECRETARY OF STATE, THE APPELLANT CAN THEN BRING AN ACTION,

PURSUANT TO THE ILLINOIS BUSINESS TAKE-OVER ACT, AGAINST MITE CORPORATION FOR PENALTIES.

If the Illinois Secretary of State initiated an action against Mite Corporation (hereinafter "Mite") for penalties, pursuant to the Illinois Business Take-Over Act, he would be in contempt of the permanent injunction entered by the district court. As the Secretary of State is currently enjoined from proceeding against Mite, it is clear that the Seventh Circuit Court of Appeals properly held that the instant case is not moot. *Mite Corp. v. Dixon*, 633 F.2d 486, 490 (1980). If the judgment below is reversed the Secretary can bring an action against Mite for civil and criminal penalties, and the issue of whether the Secretary of State or Mite would prevail ultimately in any such action is not before this Court. Mite is in effect asking this Court to render an advisory opinion upon an issue, not contained in the case at bar, of whether it might prevail in an action brought by the Secretary of State for penalties stemming from its making a tender offer without first getting it registered under the Illinois Act. In the event the judgment below is reversed and the Secretary initiates an action for penalties, Mite can then properly raise any defenses. It is indisputable that if this Court reverses the decision below, the Secretary can bring an action against Mite, while the Secretary is presently enjoined from bringing such an action.

This Court has said that there are two aspects to mootness: 'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' *United States Parole Com'n. v. Geraghty*, 445 U.S. 388, 396 (1980). The controversy over the validity of the Illinois Business Take-Over Act is still a "live" one between the Secretary and Mite Corporation. The decision of this Court on the validity of the

Illinois Act clearly will affect the rights of the parties. If this Court affirms the decision below the Secretary cannot bring an action against Mite for violating the Illinois Act. If this Court reverses the decision below, however, Mite will have to defend itself in an action brought by the Secretary pursuant to the Illinois Act. In *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979) Great Western completed its tender offer after obtaining injunctive relief, but this Court said:

> . . . That acquisition did not moot the case, however, because the question whether Great Western has violated Idaho's statute will remain open unless and until the District Court's judgment is finally affirmed. *Id.* at 178.

Thus, the instant controversy remains a "live" one and the parties have a legally cognizable interest in the outcome.

Comparing the situation in the case at bar to that in *Tyco Laboratories Inc. v. Connelly*, 473 F.Supp. 1157 (D. Mass. 1979) also illustrates that the instant case is not moot. In *Tyco* the court said that the controversy had ended as Tyco no longer wished to make a tender offer, and, having not made a tender offer, Tyco was not subject to any sanctions under the Massachusett Takeover Act. *Id.* at 1159-60. The court said that Tyco "faces no adverse effects from continued enforcement of the Act" which is clearly not the situation in the case at bar in which the Secretary can bring an action against Mite for sanctions if he prevails on the merits. *Id.* at 1160. In the instant case it is Mite who is now asking for an advisory opinion that it will have a defense to an action brought by the Secretary of State. Mite made no such argument before the Court of Appeals, which correctly held that the possibility of the Secretary bringing an action for sanctions prevents the case from being moot merely because Mite withdrew its tender offer.

Assuming *arguendo* that this Court considers Mite's argument, that it has a defense on the merits to any action brought the Secretary, the instant appeal is still not moot. It is not necessary to even consider whether criminal penalties could be imposed against Mite, as the Illinois Act also provides the Secretary with the right to seek civil penalties. Ill.Rev.Stat., 1979, ch. 121 1/2, §137.65. That Mite could face civil liability precludes any consideration at this point of whether criminal penalties also could be imposed. For this reason the case cited by Mite in its brief, which all deal with criminal sanctions, are inapposite to the case at bar.

Mite argues that if it can be penalized, notwithstanding the injunction it obtained, then it is no better off than if it had not obtained the injunction. On the contrary the injunctive relief obtained by Mite allowed it to make its tender offer without getting it registered under the Illinois Act. Had Mite not withdrawn its tender offer, in the event this Court reverses the decision below the Illinois Act empowers the Secretary to seek a court order rescinding sales that are unlawful under the Act. Ill.Rev.Stat. 1979, ch. 121 1/2, §137.62.A. (A.59a)[1] In that situation Mite could not claim that simply because it completed its tender offer, after obtaining injunctive relief, it is immune from any adverse consequences from not complying with the Illinois Act. Mite is not immune from civil liability for violating the Illinois Act merely because it obtained the injunction from the district court. The decision of the Court of Appeals is itself precedent for the fact that Mite faces potential civil liability. *Mite Corp. v. Dixon, supra*, at 633 F. 2d 490.

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[1] Citation to "A" refers to the Appendix filed with the Jurisdictional Statement. Citation to "JA" refers to the Joint Appendix filed with the appellant's brief.

Although Mite did not argue before the Seventh Circuit Court of Appeals that the case at bar is moot, the Court of Appeals quite properly determined that the case is not moot. Clearly, Mite's assertion that the case is moot is based on an issue, not before the Court of whether the Secretary or Mite would ultimately prevail in an action for sanctions. The fact remains that the Secretary is currently enjoined from applying the Illinois Act against Mite. This demonstrates that the instant controversy is a "live" one which this Court should decide.

II.

THE ILLINOIS ACT IS VALID UNDER THE COMMERCE CLAUSE.

Mite argues that the Illinois Act is not evenhanded, but it is clear that the Illinois Act ensures equal treatment of all shareholders of the target company and applies equally to Illinois offerors and foreign offerors. Nor does the Illinois Act differentiate between "hostile" and "friendly" offers. Mite suggests that the Illinois Act would apply even if no shareholders live in Illinois, but in that event the Secretary is empowered to exempt an offer from registration as not necessary for the protection of Illinois shareholders. Appellees' Br. at 14; Ill.Rev.Stat. 1979, ch. 121 1/2, §137.52-9(5). Mite also points out that the Illinois Act does not apply when an issuer offers to purchase its own securities, but a target company confronted with a tender offer must file any solicitation material, requesting the acceptance or rejection of a tender offer, with the Secretary of State. Ill.Rev.Stat. 1979, ch. 121 1/2, §§137.52-9(4), 137.55. The Illinois Act is clearly evenhanded and does not have the effect of benefitting incumbent management.

Although the Illinois Act has an incidental extraterritorial effect, that is a necessary consequence of protecting Illinois

shareholders. To ensure that Illinois shareholders have full and fair disclosure and adequate time to make an informed decision, the Illinois Act has the incidental effect that all shareholders receive the same benefit. The effect on interstate commerce of requiring an offeror to register its offer with the Secretary, the possibility of a hearing, and the larger time an offer must remain open is slight.

Mite points out that its tender offer "represented a transaction in interstate commerce of approximately $23 million", but it is wrong to look at the effect on interstate commerce of not complying with the Illinois Act. Mite also argues that interstate commerce would be burdened if more than one State asserted jurisdiction, but the Illinois Act contains a comity provision allowing the Secretary to defer to another jurisdiction that is applying a statute that affords substantially equal protection. Ill.Rev.Stat. 1979, ch. 121 1/2, §137.53. The fact that a tender offer will proceed at a slower pace under the Illinois Act does not constitute the type of obstacle that would deter a company from making a tender offer. Although the Secretary has the power to deny registration if he finds that a tender offer "fails to provide full and fair disclosure . . . or that the takeover offer is inequitable or would work or tend to work a fraud or deceit upon the offerees," this is entirely compatible with the Williams Act and does not impose an excessive burden on interstate commerce.[2] Ill.Rev.Stat. 1979, ch. 121 1/2, §137.57.E.

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[2] Appellees assert that appellant argued in the Court of Appeals that it had the power to ascertain the substantive fairness of an offer. The brief for defendant Alan J. Dixon filed in the Court of Appeals stated at page 17:

The district court also concluded that as the Illinois Act authorized the Secretary of State to deny registration to an offer that he finds to be inequitable, this varies from the market approach in the Williams Act.

continued on next page

Illinois clearly has a legitimate local interest in protecting resident shareholders confronted with a tender offer. Protecting investors residing in a state has long been recognized to be a legitimate state objective. *Hall v. Geiger Jones Co.*, 242 U.S. 539, 551 (1917). Chicago Rivet is an Illinois corporation with its principal executive offices in Illinois. Over 43% of Chicago Rivet's common stock is held by the 27% of its shareholders who are residents of Illinois. The State of Illinois' legitimate local interest in protecting its residents who are confronted with a tender offer outweigh the incidental extraterritorial effect on interstate commerce, as compliance with the Illinois Act is not a significant burden. Mite points out that section 28(a) of the Exchange Act was designed to save state Blue Sky laws, but it has been suggested that the legislative history of the 1934 Act does not indicate that the savings clause was intended to be only retrospective, and that Congress did contemplete concurrent regulation of all aspects of securities.[3]

In addition to Illinois' interest in protecting its residents who are confronted with a tender offer, there is a second legitimate local interest in regulating the transfer of control of Illinois or Illinois based corporations with substantial contacts in the State. As argued in appellant's initial brief, a tender offer is sufficiently analogous to traditional internal affairs transactions of a corporation which are the subject of state

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(S.H.A. ch. 121 1/2, §137.57(E)). *The duty of the Secretary to review an offer to see if it fails to provide full disclosure of material information or is inequitable or would work a fraud or deceit, should not be construed as meaning that the Secretary would judge the substantive fairness of e.g., the amount of the offer.* The pre-offer filing and hearing provisions of the Illinois Act are not inconsistent with a market approach by allowing for review by a neutral state administrator, while the security-holders have time to consider the offer. (Emphasis added).

[3] Note, *Preemption and the Constitutionality of State Tender Offer Legislation*, 54 Notre Dame Law. 725, 731-32 (1979).

regulation. Appellant's Br. at 25-27. Here, the target company is an Illinois corporation, with its principal executive offices in Illinois, and substantial number of its shareholders, holding close to half of the shares, are Illinois residents. A tender offer brings a transfer of corporate control, and it is clear that states have an interest in regulating the transfer of corporate control as a corporation is a creature of the State. *Santa Fe Industries v. Green*, 430 U.S. 462, 479 (1977); *Cort v. Ash*, 422 U.S. 66, 84 (1975); *AMCA Int'l Corp. v. Krouse*, 482 F. Supp. 929, 939 (S.D. Ohio 1979). Accordingly, Illinois has a legitimate interest in regulating this tender offer.

The slight burden placed upon interstate commerce by requiring an offeror to get its tender offer registered and allowing more time for an investor confronted with a tender offer to make a reasoned decision based on full and fair disclosure is not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The information required under the Illinois Act is substantially similar to that required under the Williams Act, and the Secretary is authorized to accept the registration statement filed with the federal agency. Ill.Rev.Stat. 1979, ch. 121 1/2, §§137.54(C), 137.54(D). Review of an offer by the Secretary of State and the greater time afforded an investor confronted with a tender offer pose only a minimal burden on making a tender offer. The protection and benefits afforded Illinois shareholders, as well as all other shareholders, by the Illinois Act clearly outweigh the minimal incidental burden on interstate commerce.

III.

THE ILLINOIS ACT IS NOT PREEMPTED BY THE WILLIAMS ACT.

MITE asserts that the Illinois Act adopts a "regulatory approach" that is inconsistent with the "market approach" of

the Williams Act (Appellees' Br. at 25-29), but supplemental regulation protecting the investor confronted with a tender offer does not stand as an obstacle to achieving the congressional purpose of protecting investors. This Court has said that the sole purpose of the Williams Act was to protect investors confronted with a tender offer. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 35 (1977). Although Congress sought a policy of evenhandedness, this does not go to the purpose of the Williams Act. *Id.* at 29. The congressional expressions of neutrality do not transform the Williams Act into a comprehensive policy regarding all aspects of a tender offer. If the purpose of the Illinois Act was to protect the target company management or if it would have the effect of precluding the making of tender offers, the Act would stand as an obstacle to achieving the purpose of the Williams Act. The Illinois Act, however, regulates the activities of both the target company and the offeror, while furthering the purpose of the Williams Act by providing supplemental protection for the investor confronted with a tender offer.

MITE argues that the twenty business day pre-commencement filing requirement and possible administrative hearing under the Illinois Act, obstruct Congress' policy of neutrality and aid the target company management. Appellees' Br. at 32-33. As already noted the Illinois Act evenhandedly regulates the activities of the target company as well as the offeror. That Congress considered pre-commencement notification provisions without adopting them, does not establish that the Illinois Act is preempted. *DeCanas v. Bica*, 424 U.S. 351, 360 (1976). The pre-commencement filing and the possibility for an expeditious hearing before the Secretary of State do not render the shareholders the prey of incumbent management. The pre-commencement filing and hearing provisions are consistent with a market approach as the investor will still decide whether or not to tender his shares.

The Illinois Act does not have the effect of precluding the making of tender offers. Providing for a pre-commencement filing and possible expeditious hearing will hardly dissuade a company, that has made a business decision to acquire another company via a tender offer, to forego such an opportunity. Whether a particular offeror might be unsuccessful because the greater time afforded the investor by the Illinois Act might result in a competing bid, does not stand as an obstacle to achieving Congress' purpose of protecting the investor. If the target company management is able to arrange a more lucrative offer, it is the shareholder who will decide whether to tender his shares and who will benefit from a more lucrative offer.

The Williams Act affords the investor confronted with a tender offer certain minimum protections, and coordinate state regulation offering investors additional protection do not conflict with the Williams Act unless the state regulation would preclude the making of tender offers. Mite's argument that the Williams Act was designed to achieve a balance between the offeror and the target company is certainly deflated by the fact that the SEC now requires a tender offer to remain open for 20 business days. Securities Exchange Act Rule 14e-1, 17 C.F.R. §240.14e-1(1980). It is clear that the interest of Mite, or of any offeror, is to acquire the shares of the target company as cheaply as possible. The interest of the shareholders confronted with a tender offer is to obtain the highest possible price for their shares. Although speed and surprise are unquestionably beneficial to an offeror, the Williams Act was not enacted to protect an offeror who is making a tender offer. While a tender offer for all the shares of a target company need only remain open seven days under the Williams Act (15 U.S.C. §78n (d)(5)(1976)), the fact that a tender offer will proceed at a slower pace under the Illinois Act does not present a conflict when the investor is the beneficiary of the additional protection. The popularity of the cash tender offer

as the favored mechanism for acquiring another company certainly has not lessened since the SEC increased substantially the time a tender offer must remain open from the seven day minimum period in the Williams Act. This shows that the time periods in the Illinois Act would not deter the making of tender offers, and that the Illinois Act therefore does not conflict with the purpose of Congress in enacting the Williams Act.

Similarly, review by the Secretary of State regarding whether there has been full disclosure, or whether a tender offer would work a fraud, can hardly be deemed to conflict with the Williams Act which requires disclosure and contains broad anti-fraud provisions. The duty of the Secretary of State under the Illinois Act is to protect the shareholder confronted with a tender offer, and despite the Court of Appeal's opinion that a hearing could be of infinite duration there is no basis for presuming that the Secretary would be a pawn of a target company or otherwise not administer his duties expeditiously. Finally, the Secretary has consistently contended that the Illinois Act does not empower him to pass on the substantive fairness of an offer. Appellant's Br. 21-22. The Illinois Act merely ensures that there is full disclosure and adequate time for an investor to make an informed decision. The language in the Illinois Act providing that the Secretary can deny registration if an offer "is inequitable or would work or tend to work a fraud or deceit" should be construed in the conjunctive, as the power to pass on the substantive fairness of the offer is inconsistent with the purpose of the Illinois Act.

Securities regulation is a field in which coordinate state and federal regulation is well established. *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). Protection of investors, which is the sole purpose of the Williams Act, is not dependent upon the exclusivity of the Williams Act. Supplementing the protection afforded an investor, by

ensuring that full disclosure has been made and that the investor has adequate time to make an informed decision, does not conflict with the Williams Act. Congress has not expressly or implicitly preempted concurrent state regulation of tender offers. As the Illinois Act furthers the purpose of the Williams Act, it is clear the Illinois Act is valid under the Supremacy Clause.

CONCLUSION

For the above mentioned reasons, the Appellant, James Edgar, respectfully prays that this Honorable Court reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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